

## **RESPONSE TO DEFENDANT'S MOTION TO DISCLOSE SPECIFIC ITEMS OF EVIDENCE**

When the defendant did not take a breath test, he had no right to discover records concerning the breath test machine because the machine was irrelevant to the defendant's case. When the officer had probable cause to stop the defendant, nothing in the police's operating procedures was relevant. Defendants are not entitled to use discovery as a "fishing expedition." The State could present evidence of the HGN test performed on the defendant so long as the officer did not use the HGN results to quantify the degree of the defendant's intoxication.

The State of Arizona, by and through undersigned counsel, asks this Court to dismiss the Defendant's Motion to Suppress as untimely, pursuant to Rule 16.1(b), Arizona Rules of Criminal Procedure. Trial in this matter is scheduled for February 12, 1995; therefore, the Motion to Disclose Specific Items of Evidence is made untimely. In the alternative, the State responds to and opposes the Motion to Disclose Specific Items of Evidence for the reason set forth in the following Memorandum of Points and Authorities.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **FACTS:**

On August 18, 1994, at approximately 00:29 a.m., Avondale Police Officer Reynolds observed a pickup truck driven by Henry Ramirez making a very slow right turn onto Van Buren from Dysart Road. Officer Reynolds attempted to pull near to Ramirez's truck but Ramirez accelerated very quickly. Officer Reynolds caught up with the truck and paced Ramirez at 60 M.P.H. in a 40-M.P.H. zone. As Ramirez slowed to navigate a turn at Central and Van Buren, Officer Reynolds activated his overhead lights and stopped the truck. Officer Reynolds detected a moderate odor of alcohol on Ramirez, conducted field sobriety tests, and placed Ramirez under arrest for DUI.

Officer Reynolds then transported Ramirez to the Goodyear Police Station. While en route to the station, Ramirez told Officer Reynolds that his name was Jaime Ramirez. Ramirez refused to take the breath test at the station. When Officer Reynolds transported Mr. Ramirez to Angie Silva's residence, he determined that Ramirez had given him an incorrect name to cover the fact that Ramirez's driver's license was suspended.

**LAW:**

Rule 15.1(e), Arizona Rules of Criminal Procedure states:

e. Disclosure by Order of the Court. Upon motion of the defendant showing that he or she has substantial need in the preparation of his or her case for additional material or information not otherwise covered by Rule 15.1, and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to him or her. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

In this case, the documents defense counsel has requested appear to be documents relating to the Breathalyzer, the Avondale Police Department's operating procedures, and Officer Reynolds's personnel records while he has worked for that agency.

The State submits that the items that the defendant seeks have no relevance to the defendant's guilt or innocence. He may make offers of proof concerning the breathalyzers of the Goodyear and Avondale Police Departments; Standard Operating Procedures for Avondale Police Department; information regarding a relationship between Officer Reynolds and Agua Fria Towing; Officer Reynolds's personnel records while at the Avondale Police Department; and/or Officer Reynolds's HGN Certification. However, all of these requested items are irrelevant in this case. Rule 401, Rules of

Evidence, defines “relevant evidence” as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 402, Rules of Evidence, states that irrelevant evidence is inadmissible.

Because the defendant refused to submit to any breath test, no entries, operational checklists, or calibration records of any breath-testing machine could be relevant to the issues of the defendant’s impairment and driving status. And because the defendant’s vehicle was not searched when it was towed and no evidence was taken from the vehicle, it is irrelevant if Officer Reynolds had any relationship with Agua Fria Towing and what the operational orders may be for Avondale Police concerning the towing of vehicles.

Because of the defendant’s actions while driving, Officer Reynolds had probable cause to stop him. The defendant has made no showing otherwise; therefore, the police department’s operational orders pertaining to DUI stops is irrelevant.

As for Officer Reynolds’s personnel records, the defendant has not made any showing that those records would be material to any issue in his case. Like the defendant in *State v. Acinelli*, 191 Ariz. 66, 71, 952 P.2d 304, 309 (App. 1997), the defendant in this case is “effectively requesting a ‘blind fishing expedition among documents possessed by the government.’” *Id.*, citing *Jencks v. United States*, 353 U.S. 657, 667, 77 S.Ct. 1007, 1012-13, 1 L.Ed.2d 1103 (1957). The State also opposes the disclosure for the reasons set forth in the State’s Motion to Preclude and Response to Defendant’s Second Motion to Continue.

In this case, the defendant refused to take a breath test. However, Officer Reynolds administered field sobriety tests, including HGN. In *State ex rel. Hamilton v. City Court of City of Mesa*, 165 Ariz. 514, 518-19, 799 P.2d 855, 859-60 (1990), the Arizona Supreme Court set forth the foundational requirements for admission of HGN results:

Evidence derived from the HGN test, in the absence of a chemical analysis, although relevant to show whether a person is under the influence of alcohol, is only relevant in the same manner as are other field sobriety tests and opinions on intoxication. In such a case, HGN test results may be admitted only for the purpose of permitting the officer to testify that, based on his training and experience, the results indicated possible neurological dysfunction, one cause of which could be alcohol ingestion. The proper foundation for such testimony, which the State may lay in the presence of the jury, includes a description of the officer's training, education, and experience in administering the test and a showing that the test was administered properly. The foundation may not include any discussion regarding the accuracy with which HGN test results correlate to, or predict, a BAC of greater or less than .10%.

Thus, to establish the foundation to admit the HGN results in this case, the State needs only to have the officer describe his training, education, and experience in administering the test, show that he administered the test properly, and show that he was certified when he administered the HGN test. The documents that the defendant has requested have no relevance to the foundational requirement for testimony regarding HGN. Therefore, they are beyond the scope of discoverable information.

Because the requested documents are irrelevant, the defense has failed to show any substantial need for them. The defendant is obviously using this request to delay trial, and the State respectfully requests this court to consider the request unreasonable and oppressive and deny it under Rule 15.1(e), Ariz. R. Crim. P.

## **CONCLUSION**

The defendant's pleading is untimely, so this Court should deny the motion. In the alternative, because the requested items are not relevant to the issues in this case, the State asks this Court to deny the defendant's Motion to Disclose Specific Items of Evidence.